In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1005

WADE MCNEIL, PETITIONER

v.

STEWART UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is a Montana landowner and cattle rancher whose livestock graze on public lands known as Montana Grazing District No. 1. The Secretary of the Interior was authorized by the Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315 *et seq.*, which was enacted in 1934, "to regulate * * * occupancy and use" of the grazing districts created by the Act and "to provide for the orderly use, improvement, and

development of the range." 43 U.S.C. 315a. Pursuant to this authorization, he established Montana Grazing District No. 1 in 1935 and, by regulation, directed that a preference be given in the granting of grazing privileges to landowners in the livestock business who used the property for a continuing livestock operation in the "priority period" of 1929 to 1934. 43 C.F.R. (1954 rev.) 161.2 (43 C.F.R. (1964 Supp.) 4110.0-5) (Pet. 3). Petitioner had used the lands for that purpose in the 1929-1934 period.

In 1956, the Secretary of the Interior added to the above regulation a "special rule" applicable to Montana Grazing District No. 1. The rule amended the "priority period" for the granting of preferences to 1947-1952.

Petitioner subsequently instituted an action in the United States District Court for the District of Columbia to set aside the "special rule" as contrary to the Taylor Act. The district court granted summary judgment for the Secretary of the Interior, but the court of appeals reversed. It based its holding on Section 3 of the Taylor Act, 43 U.S.C. 315b (Pet. 2-3), which directed the Secretary to give a preference "to those within or near a district who are landowners engaged in the livestock business, * * * as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them * * *." The court held that petitioner had been accorded a preference by the legislation at the time the Act was passed in 1934, and that he could not be deprived of that right by a "special rule" adopted more than 20 years later if that "special rule" did, in

fact, adversely affect petitioner's preference status. *McNeil* v. *Seaton*, 281 F. 2d 931 (C.A. D.C.) (Pet. App. 2, pp. 1-13).

The Bureau of Land Management thereupon computed the preference to be given petitioner on the basis of his use of his property and of the federal range as of the 1929-1934 period. This resulted in an award to him of a preferential grazing right of 143 "animal units," or less than he would have received by application of the "special rule." To make up the difference, he was awarded a secondary (or Class II)[1] preference of 89 "animal units."

Asserting that his preference should be measured by his present-day landholdings (*i.e.*, by "the full developed capacity of all of his base property" (Pet. 8)), rather than by the developed capacity of what he owned in the 1929-1934 period, petitioner challenged the validity of the allocation. The district court and the court of appeals affirmed the action of the Bureau of Land Management. The court of appeals observed that its earlier decision held only that "the Secretary could not diminish appellant's preference based on his 1929-34 use" (Pet. App. 1, p. 2).

Petitioner's principal contention—that the court of appeals misunderstood its own earlier decision in *McNeil* v. *Seaton*, 281 F. 2d 931—patently presents no question warranting review by this Court. The court of appeals considered petitioner's claim and con-

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[1] A Class II preference is a landowner's preference "dependent by location"—*i.e.*, *dependent* only on the fact that his base land is located within or near a grazing district.

cluded that the Secretary's award was based upon a correct application of the principles announced in that decision.

Moreover, whatever preferences may have been established by the Taylor Act certainly did not encompass post-1934 increases in productivity of land owned at that time. Petitioner's claim is essentially that having once been accorded preferential status, he may increase that preference yearly by increasing the productivity of his base lands. But the Taylor Act could not have been intended to deprive landowners purchasing property after 1934 of their rights in favor of a limitless preference for cattle ranchers who happened to own some land in the vicinity in 1934.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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